## HONG XIN CONSTRUCTION SDN BHD v. SYARIKAT PERUMAHAN NEGARA BHD

HIGH COURT MALAYA, SHAH ALAM
SUMATHI MURUGIAH JC
[CIVIL SUIT NO: BA-22C-26-07-2022]
2 OCTOBER 2024

**Abstract** – *In construing the intention of parties to a contract, the court will consider, not only the documents involved, but also the surrounding circumstances and facts leading to the formation of the contract. The parties must be taken to have been fully aware of what they are getting into when they entered into the contract. The court would thus give effect to the intention of the parties. Hence, where the parties have been clearly proven to have intended to be bound by the terms of the letter of undertaking, in the absence of any evidence to the contrary, the court will give effect to those terms. It is not the function of the court to rewrite the agreed terms by interpreting otherwise as intended by the parties to the agreement.*

***CIVIL PROCEDURE:*** *Action – Cause of action – Duplicity – Whether present suit same with earlier concluded action – Whether judgment sum obtained through earlier concluded action paid any time before or during course of present suit – Whether claim in earlier concluded action withdrawn prior to any findings by judge in earlier concluded action – Whether principle of judicial estoppel applicable*

***CONTRACT:*** *Letters of undertaking – Interpretation – Whether formed contract – Whether letter and facts surrounding issuance to be considered as a whole – Whether confirmed averment of promise to pay – Whether failure to produce another letter referred in letter of undertaking or to call person who had personal knowledge of its contents attracted adverse inference – Whether letter of undertaking created privity of contract between parties – Whether parties bound by terms of letter of undertaking*

***WORDS & PHRASES:*** *'undertaking' – Meaning of – Promise or pledge to do something or to refrain from doing something – Objective of issuance of letter of undertaking – Whether parties bound by terms of letter of undertaking*

The defendant and Cosmic Master Development Sdn Bhd ('CMDSB') entered into a development agreement and a project business collaboration agreement ('agreements') in relation to a project. Based on the collaboration agreement, the defendant had assigned all rights and responsibilities over the project to CMDSB and for which the defendant had executed a limited power of attorney in favour of CMDSB. By way of a letter of award ('LOA'), CMDSB appointed the plaintiff as the (building) contractor for the execution and completion of the remaining works under the project. The LOA

incorporated the articles of agreement and the conditions of contract of PAM Contract 2006 (Without Quantities). The plaintiff's appointment under the LOA was, however, not subject to the development agreement and/or collaboration agreement. Subsequently, upon CMDSB's request, the defendant issued its letter of undertaking in compliance to cl. 2.0 and cl. 3.4 of the LOA ('impugned letter'). During the course of the works, certificates of payment nos. 1, 2 and 3 ('certificates of payment') were issued in favour of the plaintiff, however, no payments were made to the plaintiff. Subsequent to the certificates of payment, the plaintiff submitted its progress claims nos. 4, 5, 6 and 7 ('progress claims'), which were not certified by CMDSB. Although there were no contemporaneous documents whatsoever from the defendant and/or CMDSB disputing that works had been carried out for any of the certificates of payment or the progress claims, no payments were made to the plaintiff. The plaintiff, therefore, commenced a civil action against CMDSB and the defendant ('JBHC suit'). The plaintiff's claim in the JBHC suit was allowed based on payment certificates nos. 1, 2 ,3 and payment claim no. 4 for a total sum of RM14,064,534.36 ('judgment') and the judgment was affirmed by the Court of Appeal. However, the claim against the defendant at the JBHC suit was discontinued/withdrawn by the plaintiff prior to its conclusion with liberty to file afresh. The plaintiff contended that the impugned letter was an undertaking to pay directly to the plaintiff payments due to it under the project and as such, the defendant was bound by its promise to pay the judgment sum of RM14,064,534.36 to the plaintiff as sum owed for the works done under the project. The defendant, on the other hand, claimed that it was not privy to the LOA between the plaintiff and CMDSB and as such, the sum of RM14,064,534.36 was claimable from CMDSB as the cause of action arose from the LOA. It was also the defendant's contention that the impugned letter was not an undertaking to pay but a letter merely allowing the payment to the plaintiff to be made using the Akaun Pemaju Perumahan ('HDA'). The issues that arose for the court's consideration were: (i) whether the plaintiff's claim was a duplicity claim with the JBHC suit and as such, was judicially estopped to bring this action against the defendant; (ii) whether the impugned letter issued by the defendant to the plaintiff was a letter of undertaking; and (iii) if so, whether the defendant was bound by the letter of undertaking dated 16 August 2018.

**Held (allowing plaintiff's claims):**

**(1)** The action brought by the plaintiff against CMDSB and the defendant (initially) was for the recovery of the certificates of payment and the progressive claims, which was not paid to the plaintiff. The JBHC suit had determined both liability and quantum against CMDSB. In this case, the plaintiff's claim against the defendant was pursuant to the impugned letter, which the plaintiff claimed was a letter of undertaking by the defendant to pay the sum certified for the works done at the project to

it directly. As such, this action was clearly not a duplicity with the action filed and concluded in the JBHC suit. The judgment sum obtained through the JBHC suit was not paid to the plaintiff by CMDSB any time before or during the course of this suit. Furthermore, since the plaintiff had withdrawn the claim against the defendant at the JBHC suit prior to any findings made by the judge in the JBHC suit, this action could not be said to be a duplicity. Through this suit, the plaintiff was merely enforcing the promise to pay *via* the impugned letter issued by the defendant to the plaintiff. (paras 14-16 & 18)

**(2)** The principle of judicial estoppel is premised on an 'assertion of an inconsistent position in a subsequent proceeding' and seeks to 'address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal'. The plaintiff had not taken a position in the JBHC suit which was inconsistent with its position in this suit and, neither had it benefited from the JBHC suit but had yet proceeded in this suit to claim against the defendant. As such, the plaintiff was not judicially estopped to bring this action against the defendant. (para 19)

**(3)** The legal meaning of the word 'undertaking' means 'a promise or a pledge to do something or to refrain from doing something'. In interpreting the impugned letter, not only the contents of the letter had to be taken into consideration but also the fact that the letter was issued by the defendant on its own letterhead to the plaintiff. Furthermore, if the objective to issue the impugned letter was merely to confirm which account will be used to pay the plaintiff as contended by the defendant, then, the words preceding 'Akaun Pemaju Perumahan (HDA)' that was '… akan dibayar terus kepada pihak tuan melalui …' was not even necessary to be stated in this letter. Taking the letter in its entirety, with the presence of these words, it only confirmed the plaintiff's averment that the defendant had promised or undertaken to pay to the plaintiff directly *via* the HDA through this letter, thus making it an undertaking to pay. (paras 22, 24 & 25)

**(4)** The impugned letter had made reference to a letter issued by the defendant to CMDSB dated 4 June 2018, but it had not been produced during trial. Neither did the defendant call the person or persons who had personal knowledge of the contents of the letter or the impugned letter to give evidence in court on behalf of the defendant. A presumption that the revelation of the same would be unfavourable to the defendant could be arrived at, hence, s. 114(g) of the Evidence Act 1950 was invoked against the defendant. The fact that one of the pre-conditions to commence its works pursuant to the LOA was to obtain a letter of undertaking from the defendant, confirmed that the impugned letter was the only letter issued to the plaintiff by the defendant as required under the LOA in order for the plaintiff to commence its

works. There was no evidence from the defendant of any other letter issued in compliance of the preconditions of the LOA or a denial that the impugned letter was not the letter issued for the purpose as required by the LOA. Therefore, the impugned letter was indeed a letter of undertaking issued to the plaintiff promising to make direct payment *via* the HDA as required under the LOA. (paras 26-29)

**(5)** The letter of undertaking was a contract. By the issuance of the letter of undertaking and the same being a contract, there was privity of contract created between the defendant and the plaintiff. Furthermore, by the letter of undertaking being a pre-condition in the LOA, issuance of the same had made the defendant privy to the LOA *ie*, by promising to make direct payment to the plaintiff. The letter of undertaking, having been issued after and pursuant to the LOA, formed a collateral contract entered by the parties. (paras 30, 32 & 33)

**(6)** The defendant's contention that the payment which was to be made *via* the HDA to the plaintiff was subject to there being balance in the said HDA was irrelevant as far as the obligation to make direct payment pursuant to the letter of undertaking was concerned. The words 'akan dibayar terus' were not necessary to be included if the intention was only to state from which account the payment was to be made. In fact, the word 'terus' which translated to 'direct' could only mean 'direct payment will be made', in this case, by the defendant. In the absence of any evidence that the letter of undertaking had been revoked and/or cancelled by the defendant, the defendant was bound by its obligation as per the letter of undertaking. (paras 37, 38 & 41)

**Case(s) referred to:**

*Concrete Engineering Products Bhd v. Greengroup Engineering Sdn Bhd & Anor [2018] CLJU 1898; [2018] 1 LNS 1898 HC* ***(refd)***

*Dato' Shazryl Eskay Abdullah v. Merong Mahawangsa Sdn Bhd & Anor [2014] 5 CLJ 265 CA* ***(refd)***

*Hiap Huat Pottery (S) Pte Ltd v. TV Media Pte Ltd [1969] 1 SLR* ***(refd)***

*Kumpulan Darul Ehsan Bhd v. Mastika Lagenda Sdn Bhd [2017] 7 CLJ 525 FC* ***(refd)***

*Lew On v. Mohammad Muhamed Avvuu; Setiamas Sdn Bhd & Anor (Third Party) [2022] CLJU 103; [2022] 1 LNS 103 HC* ***(refd)***

*Malayan Banking Bhd v. Government Of Malaysia [2023] CLJU 1771; [2023] 1 LNS 1771 HC* ***(refd)***

*NV Bina Sdn Bhd v. Magna Park Sdn Bhd [2014] CLJU 1915; [2014] 1 LNS 1915 HC* ***(refd)***

*Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors [2017] 5 CLJ 595 CA* ***(refd)***

*Tan Sri Rozali Ismail v. Abdul Hadi Hamad & Anor [2023] 3 CLJ 113 HC* ***(refd)***

**Legislation referred to:**

Evidence Act 1950, s. 114(g)

*For the plaintiff - James P Monteiro; M/s TJ Goh & Co*

*For the defendant - Syed Fadzil Alhabshi & Aawaisha Pillai; M/s Sidek Teoh Wong & Dennis*

*Reported by S Barathi*

## JUDGMENT

**Sumathi Murugiah JC:**

### Introduction

**[1]** This is an action brought against the defendant, being the employer, based on a letter dated 16 August 2018 (the impugned letter) alleged to be an undertaking issued to the plaintiff by the defendant.

**[2]** Relying on the impugned letter, the plaintiff sought for the sum of RM14,064,534.36 to be paid by the defendant. This sum is the judgment sum obtained through the Johor Bahru High Court *vide* Civil Suit No: JA-22C-4-06-2019 ("JBHC suit") by the plaintiff against Cosmic Master Development Sdn Bhd ("CMDSB").

### Brief Background

**[3]** The defendant and CMDSB entered into a development agreement dated 22 January 2007 ("development agreement") and a project business collaboration agreement dated 25 July 2011 ("collaboration agreement") (hereinafter referred to as the "agreements") in relation to a project known as "Cadangan Pembangunan Rumah Pangsa Mampu Milik Sebanyak 972 Unit Serta Kemudahan Yang Terdiri Daripada 1 Unit Pencawang Stesyen Utama (SSU), 4 Unit Pencawang TNB, 1 Unit Surau, 1 Unit Pondok Pengawal, 6 Unit Pusat Pengumpulan Sampah Di Atas Lot 189189, 189190 & 189191 Mukim Plentong, Johor Bahru Untuk Tetuan Syarikat Perumahan Negara Berhad" ("the project").

**[4]** Based on the collaboration agreement, the defendant had assigned all rights and responsibilities over the project to CMDSB and for which the defendant had executed a limited power of attorney in favour of CMDSB.

**[5]** By way of a letter of award dated 24 April 2018 ("LOA"), CMDSB subsequently appointed the plaintiff as the (building) contractor for the execution and completion of the remaining works under the project. The LOA incorporated the articles of agreement of PAM Contract 2006 (without quantities) and the Conditions of Contract of PAM Contract 2006 (without quantities). The plaintiff's appointment under the LOA was, however, not subject to the development agreement and/or collaboration agreement.

**[6]** By way of a letter dated 30 April 2018 ("CMDSB's letter dated 30 April 2018"), CMDSB wrote to the defendant requesting for the issuance of its letter of undertaking in compliance to cl. 2.0 and cl. 3.4 of the LOA.

**[7]** The defendant had subsequently issued the impugned letter:

SPNB

20 Tahun

Ruj. Kami : SPNB/BPP/TEKNIKAL/PUKAL/COSMIC/TAM/KA( 15 )/18
Tarikh : 4 hb Jun 2018

Cosmic Master Development Sdn. Bhd.
No. 18, Jalan Permas Jaya 12/14,
Bandar Baru Permas Jaya,
81750 Masai,
Johor Darul Takzim.

Tuan,

CADANGAN PEMBANGUNAN PERUMAHAN MAMPU MILIK DI GM 864 LOT 1158, GM 865 LOT 1991 DAN GM 785 LOT 2156, MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM (TAMAN SERI MOLEK PERDANA)
- Perjanjian 'Project Business Collaboration' Di antara SPNB Dan Cosmic Master Development Sdn Bhd Bertarikh 25 Julai 2011
- *Pembayaran Terus Kepada Hong Xin Construction Sdn Bhd (HXCSB)*

Merujuk kepada perkara tersebut di atas, surat daripada pihak tuan ruj.: CMD/SPNB/052018/0004 yang bertarikh 18 Mei 2018 adalah dengan ini dirujuk.

2. Pihak kami ingin mengesahkan dan menyatakan bahawa permohonan pihak tuan agar bayaran terus dapat dibuat kepada pihak Hong Xin Construction Sdn Bhd (HXCSB) bagi kemajuan kerja melalui Akaun Pemaju Perumahan (HDA) adalah dipersetujui pihak kami.

Sekian.

*'Perumahan Untuk Semua'*

AMIRUDDIN SHAH HEZAN SHAH
KETUA BAHAGIAN PENGURUSAN PROJEK

**[8]** During the course of the works, certificates of payment nos. 1, 2 and 3 ("certificates of payment") were issued in favour of the plaintiff, however, no payments were made to the plaintiff for the same. Subsequent to the certificates of payment, the plaintiff had also submitted its progress claims nos. 4, 5, 6 and 7 ("progress claims"), which were not certified by CMDSB.

Although there are no contemporaneous documents whatsoever from the defendant and/or CMDSB, disputing that works had been carried out for any of the certificates of payment or the progress claims, no payments were made to the plaintiff.

**[9]** As a consequence of the non-payment of the certificates of payment and the progress claims, the plaintiff had commenced a civil action against CMDSB and the defendant through the JBHC Suit. Upon the conclusion of the JBHC suit, the learned High Court Judge on 25 October 2020 ("judgment") allowed the plaintiff's claim based on payment certificates nos. 1, 2 ,3 and payment claim no. 4 for a total sum of RM14,064,534.36. This judgment was affirmed by the Court of Appeal *vide* Civil Appeal No. J-02(c)(W)-1821-11-2020.

**[10]** The claim against the defendant at the JBHC suit however was discontinued/withdrawn by the plaintiff on 1 July 2019 prior to its conclusion with liberty to file afresh. It is the plaintiff's contention that the impugned letter is an undertaking to pay directly to the plaintiff payments due to it under the project. As such, the defendant is bound by its promise to pay the judgment sum of RM14,064,534.36 to the plaintiff as the sum owed to the plaintiff for the works done under the project.

**[11]** The defendant, on the other hand, claims that it is not privy to the LOA between the plaintiff and CMDSB and as such, the sum of RM14,064,534.36 is claimable from CMDSB as the cause of action arose from the LOA. It is also the defendant's contention that the impugned letter is not an undertaking to pay but a letter merely allowing the payment to the plaintiff to be made using the HDA.

**[12]** Since there was already a suit which had been filed by the plaintiff against CMDSB, it is the defendant's contention that this action against it is a duplicity of action and therefore, an abuse of the court.

**Issues**

**[13]** Issues which have to be considered by this court arising from both parties' case are as follows:

(i) whether the plaintiff's claim through this suit is a duplicity claim with the JBHC suit and as such is judicially estopped to bring this action against the defendant;

(ii) whether the impugned letter issued by the defendant to the plaintiff is a letter of undertaking; and

(iii) if so, whether the defendant is bound by the letter of undertaking dated 16 August 2018.

A **Findings Of The Court**

*Whether The Plaintiff's Claim Through This Suit Is A Duplicity Claim With The JBHC Suit And As Such Is Judicially Estopped To Bring This Action Against The Defendant*

B **[14]** The action brought by the plaintiff against CMDSB and the defendant (initially) was for the recovery of the certificates of payment and the progressive claims which was not paid to the plaintiff. The JBHC suit had determined both liability and quantum against CMDSB (by which time the plaintiff had withdrawn its claim against the defendant through the JBHC suit).

C

**[15]** In this case, the claim made by the plaintiff against the defendant is pursuant to the impugned letter, which the plaintiff claims is a letter of undertaking by the defendant to pay the sum certified for the works done at the project to it directly.

D **[16]** As such, this action is clearly not a duplicity with the action filed and concluded at the JBHC suit.

**[17]** This court accepts and reiterates the reference made by the plaintiff to the case of *Tan Sri Rozali Ismail v. Abdul Hadi Hamad & Anor* [2023] 3 CLJ 113; [2023] 9 MLJ 346, where the High Court explained what amounts to a duplicity of proceedings:

E

> [76] Therefore, there is a clear duplicity of proceedings. It is undesirable **that two different courts are asked to decide on the same or similar issues** (see *Oversea-Chinese Banking Corporation Ltd v. National Union of Bank Employees & Ors* [1985] 1 MLJ 439 Wan Hamzah J and *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1988] 2 MLJ 184 (SC)).
>
> [77] Therefore, on this ground of duplicity of proceedings, this appeal should also be dismissed. (emphasis added)

F

**[18]** It is an undeniable fact that the judgment sum obtained through the JBHC suit was not paid to the plaintiff by CMDSB any time before or during the course of this suit. Furthermore, since the plaintiff had withdrawn the claim against the defendant at the JBHC Suit prior to any findings made by the learned High Court Judge at the JBHC suit, this action against the defendant cannot be said to be a duplicity. Through this suit, the plaintiff is merely enforcing the promise to pay *via* the impugned letter issued by the defendant to the plaintiff.

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**[19]** As to whether the plaintiff is judicially estopped to bring this action, as submitted by the plaintiff, the principle of judicial estoppel is premised on an "assertion of an inconsistent position in a subsequent proceeding" and seeks to "address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal" as established in the case of

I

*Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors* [2017] 5 CLJ 595; [2017] MLJU 273. Correspondingly, the plaintiff has not taken a position in the JBHC suit which is inconsistent with its position in this suit and neither has it benefitted from the JBHC suit but had yet proceeded in this suit to claim against the defendant. As such, the plaintiff is not judicially estopped from bringing this action against the defendant.

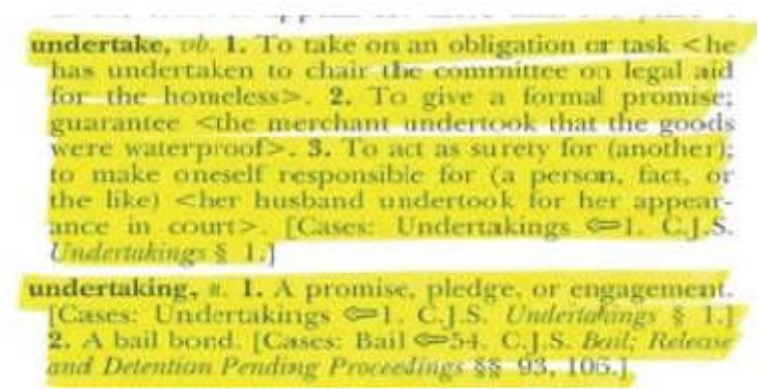
*Whether The Impugned Letter Issued By The Defendant To The Plaintiff Is A Letter Of Undertaking*

**[20]** Undisputedly, the impugned letter is issued by the defendant in the plaintiff's name directly. The letter from the defendant was a requirement to be obtained in the plaintiff's name pursuant to cl. 2.0 of the LOA:

> **2.0 Contract Period**
>
> The Works shall be completed within Seven (7) months from the Commencement Date of the Works. The commencement date shall be advice by the Architect and subject to the following:-
>
> a) Letter of Undertaking from Syarikat Perumahan Negara Berhad (SPNB) to direct disbursement the certified progress payment to the Hong Xin Construction Sdn Bhd;
>
> b) Letter of approval in granting the banking facilities *ie,* Contract Financing from OCBC Bank (M) Berhad or AmBank (M) Berhad.

**[21]** It is the defendant's argument that the impugned letter is not an undertaking as the word synonym to "undertaking" or "undertake" translated in Bahasa Malaysia as "akujanji" does not appear anywhere in the said letter.

**[22]** The legal meaning of the word "undertaking" means "a promise or a pledge to do something or to refrain from doing something" in accordance to the dictionary meaning. According to *Black's Law Dictionary* 8th edn the words "undertaking" and "undertake" are as follows:



**undertake,** *vb.* **1.** To take on an obligation or task <he has undertaken to chair the committee on legal aid for the homeless>. **2.** To give a formal promise; guarantee <the merchant undertook that the goods were waterproof>. **3.** To act as surety for (another); to make oneself responsible for (a person, fact, or the like) <her husband undertook for her appearance in court>. [Cases: Undertakings ⇐1. C.J.S. *Undertakings* § 1.]

**undertaking,** *n.* **1.** A promise, pledge, or engagement. [Cases: Undertakings ⇐1. C.J.S. *Undertakings* § 1.] **2.** A bail bond. [Cases: Bail ⇐54. C.J.S. *Bail; Release and Detention Pending Proceedings* §§ 93, 105.]

**[23]** Based on the dictionary meaning, a promise or a pledge to do something or to refrain from doing something amounts to an undertaking, as such, in the absence of the usage of the word "akujanji" (translated in Bahasa Malaysia), the question here is whether there was a promise made in this letter to the plaintiff by the defendant.

**[24]** This court does not accept to the defendant's argument that the impugned letter is merely to agree that the payment to the plaintiff will be paid through the HDA and as such is not an undertaking. This is because, if the defendant's version is correct then it makes no sense that the letter is issued to the plaintiff (being the payee) and not to CMDSB (being the payor) as alleged. In interpreting the impugned letter, this court is of the view that not only the contents of the letter have to be taken into consideration but also the fact that the letter was issued by the defendant on its own letterhead to the plaintiff.

**[25]** Furthermore, if the objective to issue the impugned letter is merely to confirm which account will be used to pay the plaintiff as contended by the defendant, then, the words preceding "Akaun Pemaju Perumahan (HDA)" that is "… akan dibayar terus kepada pihak tuan melalui …" is not even necessary to be stated in this letter. Taking the letter in its entirety, with the presence of these words, it only confirms the plaintiff's averment that the defendant has promised or undertaken to pay to the plaintiff directly *via* the HDA through this letter dated 16 August 2018, thus making it an undertaking to pay.

**[26]** Furthermore, the impugned letter had made reference to a letter issued by the defendant to CMDSB dated 4 June 2018 ("letter dated 4 June 2018"), however, this letter which was referred to had not been produced during trial in order for this court to know the contents of the same. Neither did the defendant call the person or persons who had personal knowledge of the contents of the letter dated 4 June 2018 or the impugned letter to give evidence in court on behalf of the defendant.

**[27]** It cannot be denied that the letter dated 4 June 2018 referred to in the impugned letter would surely shine some light as to the reason for the issuance of the impugned letter by the defendant. Due to the nonproduction of the same and the failure to call any witness who had personal knowledge of the matters dealt with at that material time in relation to the LOA and the required letter of undertaking, including the issuance of the impugned letter, a presumption that revelation of the same would be unfavourable to the defendant can be arrived at, hence, this court invokes s. 114(g) of the Evidence Act 1950 against the defendant.

Section 114(g) of the Evidence Act 1950

Court may presume existence of certain fact

114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case …

g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it; …

**[28]** Additionally, the fact that one of the preconditions to commence its works pursuant to the LOA is to obtain a letter of undertaking from the defendant only confirms that the impugned letter being the only letter issued to the plaintiff by the defendant as required under the LOA in order for the plaintiff to commence its works. There is no evidence from the defendant of any other letter issued in compliance of the preconditions of the LOA or a denial that the impugned letter is not the letter issued for the purpose as required by the LOA.

**[29]** Therefore, this court is of the view that the impugned letter is indeed a letter of undertaking issued to the plaintiff promising to make direct payment *via* the HDA as required under the LOA (henceforth, referred to as the letter of undertaking).

*Whether The Defendant Is Bound By The Letter Of Undertaking*

**[30]** To begin with, this court is of the view that the letter of undertaking is a contract (see cases: *Concrete Engineering Products Bhd v. Greengroup Engineering Sdn Bhd & Anor* [2018] CLJU 1898; [2018] 1 LNS 1898; *NV Bina Sdn Bhd v. Magna Park Sdn Bhd* [2014] CLJU 1915; [2014] 1 LNS 1915; [2016] 9 MLJ 313).

**[31]** It is the defendant's contention that there is no obligation to pay the plaintiff as there is no privity of contract between the plaintiff and the defendant. The liability established at the JBHC suit is against CMDSB and as such, the plaintiff's recourse is against CMDSB and not the defendant.

**[32]** Though the defendant's contention may be correct in so far as that the liability under the LOA is on CMDSB to pay the plaintiff, however, by the issuance of the letter of undertaking and the same being a contract, there is privity of contract created between the defendant and the plaintiff. Furthermore, by the letter of undertaking being a precondition in the LOA, issuance of the same had made the defendant privy to the LOA, *ie*, by promising to make direct payment to the plaintiff.

**[33]** The fact that the letter of undertaking is issued after and pursuant to the LOA, this court finds that the letter of undertaking forms as a collateral contract entered by the parties as per the case of *Malayan Banking Bhd*

*v. Government Of Malaysia* [2023] CLJU 1771; [2023] 1 LNS 1771; [2023] MLJU 2015, where Khadijah Idris J had referred to the Singapore case of *Hiap Huat Pottery (S) Pte Ltd v. TV Media Pte Ltd* [1969] 1 SLR in relation to collateral contract:

> [68] In the case cited by the Plaintiff *Hiap Huat Pottery (S) Pte Ltd v. TV Media Pte Ltd* [1969] 1 SLR the Court held a collateral contract existed as a supplementary contract to a main contract which had already been in existence. It was also held that the main contract may be between the same parties as the collateral contract or it may be between a third party and one of the parties to the collateral contract.
>
> [69] In this instant case, the evidence adduced shows the Shipbuilding Contract which was between Defendant and NGV Tech was the main contract while the collateral contract was between Plaintiff and the Defendant that the Shipbuilding Contract was to be continued subject to the continued funding from the Plaintiff which in turn is subject to, critically, the waiver of the liquidated damages.
>
> [70] Thus the Defendant's contention that the Plaintiff is not a party to the Shipbuilding Contract is immaterial and irrelevant.

**[34]** The court also refers to the case of *Lew On v. Mohammad Muhamed Avvuu; Setiamas Sdn Bhd & Anor (Third Party)* [2022] CLJU 103; [2022] 1 LNS 103; [2021] MLJU 2787, where Awg Armadajaya Awg Mahmud JC held that:

> [28] The exceptions to the Common Law doctrine of privity of contract allow rights to third parties and some impositions of obligations. These are:
>
> i. Collateral Contracts (between the third party and one of the contracting parties).

**[35]** Furthermore, the plaintiff's action against the defendant is for the breach of the letter of undertaking and not the LOA. The only condition set in the letter of undertaking is for direct payments to be made to the plaintiff for the certified progressive claims. In this case, although there were progressive claims that were uncertified but by virtue of the judgment of the JBHC suit, there was a judicially certified sum, *ie*, RM14,064,534.36 payable to the plaintiff.

**[36]** The defendant had also additionally contended that the payment which is to be made *via* the HDA to the plaintiff is subject to there being balance in the said HDA. It was established during cross-examination of the defendant's sole witness that the letter of undertaking does not contain any language or words that subjects the letter of undertaking to the agreements and that the payments were to be made to the plaintiff *via* the HDA provided there was balance in the said account.

40.5 Further still, the Defendant's sole witness confirmed that notwithstanding the expiration of the Collaboration Agreement on 31.3.2019, the Defendant did not at any material time withdraw the Letter of Undertaking issued to the Plaintiff.

3621 JM: Apabila perjanjian kerjasama telah luput seperti yang alleged
3622 yang dikatakan disini, adakah pihak SPNB menulis menulis
3623 kepada pihak Plaintif menarik balik surat akujanji di muka
3624 surat 254 bundle 1? Did SPNB write to the Plaintiff to
3625 withdraw this letter after this alleged lapsed of perjanjian
3626 Kerjasama?
3627 SD1: Dalam pengetahuan saya tiada. Yang Arif.

**[37]** This court finds that this is an unfounded argument by the defendant as clearly there are no such conditions stated in the letter of undertaking. Whether there is any balance in the HDA or not is irrelevant as far as the obligation to make direct payment pursuant to the letter of undertaking is concerned.

**[38]** Again, this court finds that the words "akan dibayar terus" are not necessary to be included if the intention is only to state from which account the payment is to be made. In fact, the word "terus" which translates to "direct" can only mean "direct payment will be made", in this case, by the defendant.

**[39]** This court is minded of the case of *Kumpulan Darul Ehsan Bhd v. Mastika Lagenda Sdn Bhd* [2017] 7 CLJ 525; [2017] 4 MLJ 561, as highlighted by the plaintiff where the Federal Court held that:

> [23] In considering Question 1 it must be taken into account what the parties agreed to in the SSA. In this case there were two crucial matters agreed upon, namely, the option right and the waiver provision. As such those terms must be considered in the light of the legal principles, to wit, **that the sanctity of a contract must be preserved and that it is not the function of the court to rewrite the agreed terms in a contract** (see *The Pacific Bank Bhd (sued as guarantor) v. Kerajaan Negeri Sarawak* [2014] 6 MLJ 153). (emphasis added)

(Also see: *Dato' Shazryl Eskay Abdullah v. Merong Mahawangsa Sdn Bhd & Anor* [2014] 5 CLJ 265; [2014] 3 MLJ 892 – submitted by the plaintiff).

**[40]** It is this court's view that the very fact that the defendant had produced the letter of undertaking in its own letterhead to the plaintiff directly, it can be very well taken that it would have thought about the seriousness and the effect of the words stated in the contents of the said letter.

**[41]** Although the defendant had contended that since the collaboration agreement between the defendant and CMDSB had ended and as such this letter of undertaking is no longer valid, there is no evidence produced to this court to show that the letter of undertaking has been revoked and/or cancelled by the defendant. As such, this court is of the considered view that the defendant is to bound its obligation as per the letter of undertaking.

A

## Conclusion

**[42]** Based on all the evidence produced before this court, in the upshot, this court allows the plaintiff's claims, and the defendant is ordered to pay to the plaintiff as follows:

B

(i) the sum of RM14,064,534.68;

(ii) interest at 5% per annum on the sum of RM14,064,534.68 from 16 August 2018 until the date of this judgment;

(iii) interest at 5% per annum on the sum of RM14,064,534.68 from the date of this judgment until full realisation; and

C

(iv) cost of RM40,000 subject to allocatur fee.

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